

1409924 (Migration) [2015] AATA 3088 (15 July 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sandeep Sharma
CASE NUMBER:	1409924
DIBP REFERENCE(S):	CLF2013/82852
MEMBER:	Hugh Sanderson
DATE:	15 July 2015
PLACE OF DECISION:	Sydney
DECISION:	The tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 15 July 2015 at 11:18am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 6 May 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 April 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the parties were in a genuine and continuing relationship.

BACKGROUND

4. The applicant is a citizen of India and is currently 28 years old. He first entered Australia on 18 July, 2008 holding a subclass 573 Student visa. Apart from one month in September 2009 he has remained in Australia since then.
5. The applicant's Student visa was cancelled on 30 August, 2012. He has not held a substantive visa since that date. After the department cancelled his visa, the applicant applied to the tribunal (differently constituted) seeking a review of that decision. The tribunal found that the applicant's enrolment in the course of study he had in Australia was cancelled because of non-payment of fees in February 2012. The tribunal found that the basis for the reason of the cancellation of his visa had been established and that there were no exceptional circumstances beyond the applicant's control why the visa should not be cancelled. The decision of the department to cancel the applicant's Student visa was affirmed on 9 January, 2013.
6. The sponsor of the applicant is Luafata Solomua. She was born in Samoa and is currently 24 years old. She is an Australian citizen and has provided to the department a copy of her Australian passport. Her parents and six siblings all reside in Australia.
7. The parties claimed that they first met each other on 21 May, 2012 at the Gate Gourmet where they were both working. They claimed that they started dating in August 2012. Although there were some problems in the relationship, the sponsor claimed that she committed herself to the relationship after returning from a holiday in Samoa in January 2013.
8. The parties were married on 13 March, 2013. A copy of the marriage certificate has been provided to the department. There is nothing to indicate that the marriage between the parties is not valid. The current application was filed on 16 April, 2013.
9. The parties had a daughter together, Indiana, born on 3 January, 2014. A copy of Indiana's birth certificate has been provided to the department.
10. The delegate who considered the application noted the following issues:

- Details of joint bank accounts opened by the parties provided no details which indicated that this account was legitimately used by the parties together;
- The applicant disclosed in his application that the parties were not living at the same address due to the “financial situation and looking for suitable accommodation”;
- The applicant subsequently claimed that the parties were living together from April 2013;
- Documentation provided by the parties did not indicate that they were living at the same address until February 2014;
- Statements had been provided by friends that they believed the relationship is genuine, however, there was little basis given as to why they believed the relationship was genuine;
- There were no statements from the sponsor’s family in support of the application;
- There were several inconsistencies in the statements provided by the parties which called into question the credibility of the information provided;
- There was evidence that even after knowing each other for a period of time they had “broken up” about 4 or 5 times in the space of seven months;
- It was claimed that a child had been born of the relationship; and
- There was little further information which indicated the parties considered the relationship a long-term relationship.

11. Based on these issues, the delegate concluded that they were not satisfied that the applicant and the sponsor were in a genuine and continuing relationship and therefore the applicant did not meet the definition in s.5F of the spouse of the sponsoring partner. Accordingly, the delegate found that the applicant did not satisfy the criteria in cl.820.211(2)(a). The delegate found that the applicant did not meet any of the alternative criteria and refused the application.
12. The tribunal invited the applicant to attend the hearing in respect of the application for a review of the department’s decision. In that invitation, the tribunal noted that the applicant did not appear to meet the Schedule 3 criteria. The applicant was invited to provide any information as to compelling reasons for not applying the Schedule 3 criteria.
13. The applicant provided DNA testing which confirmed he was the father of the parties’ child.
14. The applicant provided further material in support of the application, including statements from the parties and friends. The applicant set out claims for not applying the Schedule 3 criteria. These included:
 - The applicant has now been in a relationship with the sponsor for some time and having to be separated from her and his daughter would be hard;
 - The parties have a daughter who suffers from eczema and needs special care;
 - The applicant is the main breadwinner for the family; and
 - The applicant now has many ties with Australia and is employed full time.

THE HEARING

15. The applicant appeared before the tribunal on 14 July 2015 to give evidence and present arguments. The tribunal also received oral evidence from the sponsor.
16. The applicant acknowledged that at the time of the application he had not held a substantive visa for at least seven months prior to his application for the Partner visa. He said that he did not know what a substantive visa was at that time or what the Schedule 3 criteria was.
17. The applicant said that he and the sponsor first started living together about two or three days after they were married. He said they were living in a two bedroom Strathfield apartment he shared with four other male Indian students. He said that before that the sponsor was living with her parents and eight siblings in Eagle Vale. He said they found alternative accommodation in Beverly Hills and moved there on about 20 March 2013, though they did not sign the lease for the property until 20 April 2013.
18. The tribunal noted the inconsistency in the information in the application and sponsorship form which indicated that at the time of the application the parties were not living together. The applicant said that this was just a mistake and it was put so that correspondence was sent there. The tribunal noted that as there was a separate question for where correspondence was to be sent and the information he gave as to giving the wrong address as to the residential address of the parties was not plausible. The applicant did not have any response.
19. The applicant said that at the time of the application he was earning about \$700 per week and the sponsor was earning between \$800 and \$900 per week. They only opened a joint account after they were married. Before this their incomes were deposited into accounts they held in their sole names.
20. The applicant said his parents and two brothers continue to live in India. His father is a police officer and both his brothers are in good jobs and married. They have no problems living in India.
21. The tribunal noted that the applicant acknowledged he did not meet the Schedule 3 criteria which would otherwise require him to return to India to file any Partner visa application. The tribunal invited the applicant to provide any compelling reasons for not applying those criteria. The applicant was reminded that this was a time of application criteria and so the compelling reasons had to be assessed as at the time the application was filed.
22. The applicant said the sponsor did not want him returning to India as they wanted to live together. He said that they were thinking at that time of having a family and planning for their future. He said that things had changed since then and it would be very difficult now that they have a child. He said he was not aware of the Schedule 3 criteria at the time of the application.
23. The sponsor gave evidence in support of the application which was consistent with the evidence given by the applicant with some minor inconsistencies. She said the compelling reasons for not applying the Schedule 3 criteria was that she did not have a driver's licence and he drives her around when needed, she did not want him to return to India, and she had family problems which made it difficult to live with her parents.
24. For the following reasons, the tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in the present case is whether the applicant meets the time of application criteria that he meets the Schedule 3 criteria. If he does not, there must be compelling reasons for not applying those criteria. The tribunal has accepted the evidence of the parties as to the genuineness of their relationship. The fact that the parties have a child together, who is clearly bonded to both the applicant and the sponsor, provides the strongest evidence in support of the claim that the parties are in a genuine and continuing relationship.
26. In assessing the application, the tribunal has only considered if the applicant meets the time of application criteria of meeting the Schedule 3 criteria and, if he does not, if there are compelling reasons, at the time of the application, for not applying those criteria.

DOES THE APPLICANT MEET SCHEDULE 3 CRITERIA, OR SHOULD THOSE CRITERIA BE WAIVED?

27. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
28. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

CRITERION 3001

29. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
30. The applicant's last substantive visa was a subclass 572 Student visa. This visa was cancelled on 30 August, 2012 on the basis that the applicant was not enrolled in any course of study and had not been enrolled in any course of study since 2 February, 2012. An application to the tribunal (differently constituted) was not successful and the decision of the department to cancel the applicant's Student visa was affirmed on 9 January, 2013.
31. The applicant has not held a substantive visa since 30 August, 2012. The Partner visa application was not filed until 16 April, 2013, more than seven months after the applicant last held a substantive visa.
32. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

COMPELLING REASONS

33. As the tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
34. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria:

MZYPZ v MIAC [2012] FCA 478 at [10]; *Babicci v MIMIA* [2005] FCAFC 77 at [24]. The compelling reasons for not applying the Schedule 3 criteria must be reasons which are relevant to the purpose of permitting the person to make an application for a spouse visa in Australia: *Monakova v MIMA* [2006] FMCA 849 at [27]-[28]. The question of whether there are compelling reasons for not applying the Schedule 3 criteria must be considered in relation to circumstances existing at the time of application: *Boakye-Danquah v MIMIA* [2002] FCA 438 at [39].

35. The applicant's last substantive visa was his subclass 572 Student visa which was cancelled on 30 August, 2012. The basis of that cancellation was that the applicant was not enrolled in any course from February 2012 after his enrolment was cancelled for non-payment of fees. The applicant applied for a review of the decision to cancel his visa to the tribunal. This application was unsuccessful with the tribunal not accepting that there were any exceptional circumstances beyond the applicant's control which led to the cancellation of the visa. That decision of the tribunal was not appealed against by the applicant.
36. At the time of the cancellation of the applicant's subclass 572 Student visa, the applicant was not in a continuing relationship with the sponsor. It was acknowledged by the parties that prior to the sponsor returning to Samoa for a holiday in December 2012 the relationship they did have had broken down. At the time of the decision by the tribunal affirming the department's decision to cancel the visa the sponsor was still in Samoa.
37. The applicant claimed that he did not know what a substantive visa was or what the Schedule 3 criteria meant when his application for the Partner visa was filed. At the time of that application, the applicant had engaged in agent who assisted him in preparing and filing his application.
38. The tribunal is not satisfied that the circumstances why the applicant did not hold a substantive visa at the time of the application provides a compelling reason for not applying the Schedule 3 criteria. The applicant's Student visa was cancelled as he was not enrolled in any course of studies and had not been since February 2012. The tribunal does not accept that the financial problems the applicant may have faced provides any reasonable explanation for the fact that he did not hold a substantive visa at the time of the Partner visa application. As the parties were not married and were not living together for more than three months after the tribunal issued their decision affirming the department's decision the applicant had sufficient time to reorganise his affairs to be able to file any Partner visa application offshore.
39. The tribunal does not accept that the fact that the applicant did not know what a substantive visa was or the need to provide compelling reasons for not applying the Schedule 3 criteria provides a compelling reason for not applying those criteria. As the applicant had an agent at the time of his filing of the application he should have been aware that he did not hold a substantive visa at that time and of the requirement to provide compelling reasons for not applying the Schedule 3 criteria. Further, just because the applicant claims he was ignorant of the legal requirements does not provide a compelling reason for not applying those legal requirements when assessing the application.
40. The parties claimed that they were in a genuine relationship at the time of the application and did not want to live separately from each other. For every Partner visa application, whether that application is filed onshore or offshore, it is requirement that the parties be in a genuine and continuing relationship. This in itself requires the parties to want to live together and have plans for their future together, which usually includes having children. The fact that the parties at the time of the application did want to live together and had plans for their future life together does not provide a compelling reason for not applying the Schedule 3 criteria.

41. Accepting the parties evidence at its best, at the time of the application the parties had only been married for one month and three days. They had only been living together for about one month. They claim to have first met each other in May 2012 and started dating in August 2012. Over the period during which they were dating they had arguments which led to breaks in their relationship. The tribunal finds that the relationship, at the time of the application, was not a long-standing relationship and that the length of the relationship could not be considered a compelling reason for not applying the Schedule 3 criteria.
42. The sponsor was, prior to the parties' marriage, living with her family. There is no information which would indicate that she would not have been able to continue to rely on the support of her family if the applicant were required to return to India to file any Partner visa application there. The sponsor's income at the time of the application was equal to or slightly greater than that of the applicant. There is no information which would indicate that the sponsor was financially dependent upon the applicant at the time of the application or that she did not have the capacity to live independently if she wanted to.
43. The applicant's family continues to live in India. His father is employed with the police force and his brothers are both in secure employment. There is no information which would indicate that if the applicant were required to return to India at the time of the application he would not have been able to rely upon his family for support over the period during which any offshore Partner visa application was assessed. There is no information which would indicate that the applicant would have any difficulties in returning to India, and this is what the applicant stated his original plans were.
44. The tribunal has considered all the circumstances of the applicant and the sponsor as at the time of the application both individually and cumulatively. The tribunal is not satisfied that the circumstances of the parties provide any compelling reasons for not applying the Schedule 3 criteria. The parties spousal relationship was of very short duration at the time of the application, they only moved into a shared lease arrangement after the application was filed, both had independent sources of income, the parties both had the support of their respective families, the applicant's in India and the sponsor's in Australia, and apart from the normal hardship which would be expected from couples being separated awaiting the assessment of an offshore Partner visa application there is no information before the tribunal which would indicate that either party would suffer any significant psychological or material harm.
45. The tribunal has taken into account the claims made by the applicant with respect to the birth of his child and the dependence the sponsor and his daughter now have on him for their financial and emotional support. As has been stated above, the Schedule 3 criteria is a time of application criteria. Accordingly, the tribunal is required to consider the circumstances of the parties as at the time the application was filed and whether there are compelling reasons, at that time, for not applying the Schedule 3 criteria. The issues raised by the applicant as to the current circumstances of his family are therefore not relevant when considering this time of application criteria.
46. In light of the above findings, the tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
47. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

MINISTERIAL INTERVENTION

48. As indicated above, the submissions made by the applicant as to compelling reasons for not applying the Schedule 3 criteria primarily addressed the applicant circumstances as at the time of this decision. As the Schedule 3 criteria is a time of application criteria, the tribunal

must consider the circumstances of the applicant only at the time of the application. The tribunal accepts, however, that the current circumstances of the applicant to provide exceptional circumstances which may warrant Ministerial intervention.

49. The circumstances of the applicant which may warrant Ministerial intervention include the following:
- The applicant has a child, Indiana Sharma, with his sponsoring partner who is now one and a half years old, having been born nine months after the application was filed;
 - The applicant's child suffers from eczema and the applicant is involved in her medical treatment;
 - The sponsor and their child is dependent upon the applicant for their financial support;
 - Based on the information the applicant now has, the tribunal accepts that the parties would be assessed as being in a genuine relationship if any offshore Partner visa application was filed; and
 - If the applicant were required to return to India to file any Partner visa application it would involve prolonged separation of the applicant's child to her father which may cause continuing hardship and possible irreparable harm to his daughter at her tender age.
50. In light of the current circumstances of the applicant, and in particular his daughter, the tribunal supports an application for Ministerial intervention.

DECISION

51. The tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Hugh Sanderson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

SCHEDULE 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:

- (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
- (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
 - (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
 - (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.